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July 24, 2006

OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case:	Personnel Security Hearing
Date of Filing:	August 23, 2005
Case Number:	TSO-0286

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization (or "security clearance") under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual should not be granted an access authorization at this time.

I. Background

The individual is employed by a DOE contractor. The contractor requested an access authorization for the individual, but a background investigation uncovered information regarding past alcohol and drug use that created a security concern. In order to resolve that concern, DOE conducted a Personnel Security Interview (PSI) with the individual in October 2004. In March 2005, a DOE consultant-psychiatrist evaluated the individual and opined that the individual drinks alcohol habitually to excess.

In July 2005, DOE informed the individual how to proceed to resolve the derogatory information that had created a doubt regarding his eligibility for access authorization. Notification Letter (July 14, 2005). The Notification Letter stated that the derogatory information regarding the individual falls within the purview of 10 C.F.R. § 710.8 (f), (j), and (k) (Criteria F, J, and K). Criterion F relates to information that a person "[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive National Security Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 thru 710.30." 10 C.F.R. § 710.8(f). DOE invoked Criterion F because the individual omitted pertinent information on a Questionnaire for National Security Positions (QNSP) in September 2003. On the QNSP, the individual denied using drugs in the seven years prior to 2003, but in his psychiatric evaluation later admitted that he had used marijuana in 1999 or 2000.

The DOE Operations Office invoked Criterion J on the basis of information that the individual has been or is a user of alcohol habitually to excess, or has been diagnosed by a board-certified psychiatrist, or other licensed physician or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse. 10 C.F.R. § 710.8 (j). In this regard, the Notification Letter cites the opinion of the DOE consultant-psychiatrist that the individual has been a user of alcohol habitually to excess, most recently in 2005. DOE invoked Criterion K on the basis of information in the agency's possession that the individual has used a drug or other substance listed in the Schedule of Controlled Substances that was established pursuant to Section 202 of the Controlled Substances Act of 1970. This concern stems from the individual's admitted use of marijuana in high school and most recently in 1999 or 2000. The individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21 (b).

The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the DOE consultant-psychiatrist (DOE psychiatrist) testified on behalf of the agency. The individual testified on his own behalf and also elected to call his girl friend and a colleague as witnesses. The transcript taken at the hearing shall be hereinafter cited as "Tr." Various documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex." Documents that were submitted by the individual during this proceeding are also exhibits to the hearing transcript and shall be cited as "Indiv. Ex."

II. Analysis

The applicable regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual's future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the

potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, it is my opinion that the individual's access authorization should not be granted because I cannot conclude that such a grant would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. Findings of Fact

During 2000, the individual and his wife experienced marital difficulties, often arguing about his alcohol consumption. In October 2000, the individual was on a hunting trip, and got into an argument with his wife over the telephone on the last night of his trip. After the argument, the individual decided to drive home that night and was arrested for driving under the influence (DUI) on the way home. He was required to submit to an alcohol assessment and, according to the individual, the assessment concluded that he did not have an alcohol problem. PSI at 33-34. In June 2001, the individual's wife filed for divorce and the divorce was finalized in October 2001. Ex. 6 (Report) at 10, 13. In October 2002, he was again arrested for DUI after leaving a restaurant where he had consumed a few beers after work. Tr. at 70; Ex. 10. During the arrest, the individual registered a blood alcohol level (BAC) of .11. The case was dismissed, however, because the officer failed to appear. Ex. 9. Around that time, the individual's teen-aged son asked to move in with him and the individual filed for a modification of the existing custody order. Tr. at 64. As part of those proceedings, the court ordered him to undergo an alcohol assessment. The assessment, in November 2002, concluded that the individual did not require alcohol counseling. Ex. 7.

In March 2003, the individual began working for a DOE contractor. Ex. 12. The employer requested an access authorization for the individual and the individual completed a QNSP in September 2003. In the QNSP, the individual responded "no" when asked if he had used drugs in the seven years prior to completing the document. (i.e., between 1996 and 2003). After a background investigation revealed some issues regarding the individual's use of alcohol and drugs, DOE conducted a PSI with the individual in October 2004 in order to clarify those concerns. Ex. 13. During the PSI, the individual agreed to a psychiatric evaluation by a DOE psychiatrist. PSI at 38.

A DOE consultant-psychiatrist evaluated the individual in November 2004. During the evaluation, the individual admitted to smoking a few puffs of marijuana during 1999 or 2000 at a party at his home. Ex. 6 at 8, 20. After the evaluation, the psychiatrist concluded that the individual had met the criteria for alcohol abuse in the past, but not at the time of the evaluation. Further, the psychiatrist determined that it is probable but not conclusive that the individual is alcohol dependent. Report at 18. After reviewing the individual's alcohol use, the psychiatrist opined that the individual is drinking habitually to excess without adequate evidence of rehabilitation or reformation. Report at 18. He also concluded that the individual did not have an illness or mental condition which causes or may cause a significant defect in his judgment or reliability. In January 2005, the individual submitted to an update assessment for this proceeding. Ex. 7. That report, issued by an

alcohol treatment center, indicated that the individual's "risk for any further problems is minimal." *Id.*

B. DOE's Security Concerns

The excessive use of alcohol raises a security concern because of its intoxicating effect. "Because the use of alcohol at the very least has the potential to impair a user's judgment and reliability, individuals who use alcohol to excess may be susceptible to being coerced or exploited to reveal classified matters. These security concerns are indeed important and have been recognized by a number of Hearing Officers in similar cases." *Personnel Security Hearing*, OHA Case No. VSO-0417, 28 DOE ¶ 82,798 (2001), quoting *Personnel Security Hearing*, OHA Case No. VSA-0281, 27 DOE ¶ 83,030 at 86,644 (2000). In this case, a DOE psychiatrist opined that the individual is drinking alcohol habitually to excess. Therefore, DOE's security concerns are valid and the agency has properly invoked Criterion J in this case.

The concerns regarding Criteria F and K stem from the individual's alleged use of illegal drugs. "The use of illegal drugs can raise questions about an individual's reliability and trustworthiness, both because it may impact judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations." *Adjudicative Guidelines* (December 29, 2005) at 11. There are also substantial security concerns in the case of an individual who is not forthcoming with security personnel. "Conduct involving dishonesty or lack of candor can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process. . . ." *Adjudicative Guidelines* at 7. In this case, the individual denied using drugs between 1996 and 2003 in his QNSP, but then admitted 1999-2000 drug use during his psychiatric evaluation. Both the drug use and its omission on the QNSP are valid security concerns and the agency has properly invoked Criteria F and K in this case.

C. Hearing Testimony

1. The DOE Psychiatrist

The DOE psychiatrist testified that he had reviewed the individual's file prior to the March 2005 interview, and then consulted the *Diagnostic and Statistical Manual of the American Psychiatric Association, IVth Edition TR* (DSM IV) for a diagnosis. Tr. at 38-40. After analyzing this information, however, the psychiatrist could not arrive at a psychiatric diagnosis for the individual's current behavior. He concluded that the individual met the criteria for alcohol abuse in the past, but that this diagnosis no longer applied. Nonetheless, the DOE psychiatrist opined that the individual had been drinking habitually to excess without adequate evidence of rehabilitation or reformation in the past and was currently doing so. *Id.* at 42-49. He defined "drinking habitually to excess" as anyone who is intoxicated four or more times a year. The psychiatrist based his opinion on the individual's self-reported information that he was "intoxicated" three or four times in 2004 and five or six times per year between 1994 and 1997. *Id.* at 44-45. In order to show rehabilitation, the psychiatrist recommended that the individual: (1) produce documentary

evidence of his attendance at Alcoholics Anonymous (AA) with a sponsor at least once a week for 100 hours in a year and abstain from alcohol for 2 years; or (2) complete a professional alcohol treatment program for at least six months and abstain for at least three years. Tr. at 23-24. As for reformation the psychiatrist recommended that the individual: (1) complete a rehabilitation program and then abstain for two to three years; or (2) abstain from alcohol for at least five years. *Id.* The psychiatrist was very concerned by the individual's denial of his alcohol problem, especially with a history of two DUIs and a father and brother who were likely alcoholics. *Id.* at 35.

2. Other Witnesses

As evidence of rehabilitation and reformation, the individual presented the testimony of his colleague and girlfriend. The girlfriend testified that she has known the individual since 2002. Although they do not live together, she stated that "I'm with him 99 percent of the time." Tr. at 48. She described his current drinking pattern as one or two beers on the weekends, and no drinking during the week. She is very close to the individual's daughter, and has never heard the daughter complain about the individual's alcohol consumption. She testified that the individual does not want to be around drugs or use drugs. *Id.* at 52. Nonetheless, she was unaware of his two alcohol-related arrests and was "very surprised" to hear that he had been arrested twice for DUI. *Id.* at 51. In addition, the girlfriend did not know that the individual had attended two AA meetings, one in December 2005 and one in January 2006. Instead, he told her that he was going to "counseling." *Id.* at 50.

The colleague has known the individual for ten years. *Id.* at 36. They socialize two or three times per month. *Id.* at 37. The colleague testified that he has never seen the individual impaired or intoxicated. *Id.* at 38. When they drink together, they typically have two to three beers in one to three hours. The most alcohol that they have consumed while together is one six pack each. *Id.* at 38. The colleague was, like the girlfriend, unaware of the individual's alcohol related arrests. Nonetheless, even after being informed that the individual has had two DUIs in two years, the colleague insisted that the individual does not have a problem with alcohol. *Id.* at 38-40. When questioned about drug use, the colleague testified that he attended the party where the alleged marijuana smoking took place. *Id.* at 43-45. He did not see the individual smoke marijuana at the party and in fact, he has seen the individual refuse drugs. *Id.* at 45. He described the individual as a conscientious worker. *Id.*

3. The Individual

The individual explained that he does not recall ever using marijuana in 1999 or 2000 and is "90% certain" that he did not smoke marijuana at all during that period. Tr. at 60, 63. He admitted smoking marijuana after the age of 16, but denied doing so from 1996 to 2003, the seven years prior to completing his QNSP. *Id.* at 62. He explained that he felt pressured during the interview with the psychiatrist to give a positive answer. *Id.* at 67.

The individual admitted to a history of alcohol use and abuse. Tr. at 69. He testified that he abused alcohol during his divorce proceedings, but after his 2002 DWI, he realized that he had a problem and needed to reduce his alcohol consumption. *Id.* at 69-70. As a

result, he did not drink if he was going to drive. He reduced his consumption even further after his psychiatric evaluation in May 2005. *Id.* at 72. The individual testified that his father had a history of excessive drinking and that his brother was recently hospitalized with liver disease as a result of excessive alcohol consumption. *Id.* He was last intoxicated, by his own definition, in late 2004. *Id.* at 80.

After the psychiatric evaluation, the individual did not go to AA, but decided to deal with the issue of his alcohol consumption on his own. In November 2005, he received a copy of the psychiatric report. *Id.* at 83. He did not believe that he had an alcohol problem, but decided to attend an AA meeting in December 2005 in order to see if it would be helpful. *Id.* at 77. He also attended a meeting in January 2006, but did not like the meetings or the other attendees. He does not like AA, has no sponsor, and believes that he has no need to attend because he is not currently abusing alcohol and has not done so for approximately 14 months year prior to the hearing. *Id.* at 77-79. In fact, he is currently consuming alcohol. *Id.* at 79. However, he is now willing to attend AA and get a sponsor if necessary in order to get a clearance. *Id.* at 81-82. He admits that embarrassment prevented him from telling his girlfriend about his arrests. *Id.* at 87. He also admitted that he did not ask certain colleagues to testify on his behalf at the hearing for fear of a negative impact on his career advancement. *Id.* at 91.

D. Mitigation of the Security Concerns

1. Alcohol Use

At the conclusion of the hearing, the psychiatrist remained convinced that the individual's alcohol use is still a security concern because he has not had adequate treatment for his alcohol problem.¹ The individual, on the other hand, contends that the agency's security concerns are mitigated because he does not have an alcohol problem and currently uses alcohol responsibly. To corroborate that argument, he presented the testimony of two individuals who know him well and who confirmed that he limits his alcohol consumption to a few beers on the weekend, but does not drink to intoxication.

After reviewing the hearing testimony and the record in this case, I conclude, for the reasons given below, that the individual has not sufficiently mitigated the valid security concerns of the DOE regarding his use of alcohol. First, even though he has had two alcohol-related arrests in a short period of time, the individual has not had any alcohol treatment and continues to drink alcohol. As evidence of his rehabilitation or reformation, the individual presented a very cursory intake report from a one hour appointment at a recovery center that states that the individual has not experienced any alcohol problems since 2002, and that he is at minimal risk for further problems. Ex. 7; Tr. at 64-65. However, the author of this report did not testify or provide documentary evidence of how he reached this conclusion.² The DOE psychiatrist, who was present during the entire

¹ Unlike a medical diagnosis of alcohol abuse or alcohol dependence, I need not defer to the opinion of the DOE psychiatrist with respect to the ultimate issue here—whether the individual is an unacceptable security risk. See e.g., *Personnel Security Hearing*, Case No. VSO-0537 (September 10, 2003); *Personnel Security Hearing*, Case No. TSO-0236, 29 DOE ¶ 82,880 (2005).

² In addition, I am unable to determine if the individual who filled out the intake report is a qualified medical

hearing, reaffirmed his original findings—*i.e.*, the individual requires alcohol treatment and at least two years of sobriety for adequate evidence of rehabilitation or reformation.

Second, the individual has not admitted to himself, or to those close to him, that he has an alcohol problem.³ Throughout the proceedings, he has insisted that he did not have a problem despite a history of heavy drinking. Tr. at 71, 77. This troubled the psychiatrist who wrote in his Report that the individual “shows a complete lack of insight into the fact that he has an alcohol problem.” Report at 20, fn 48. For example, during the PSI, he said that his wife complained that he was always drinking, and he admitted drinking from one to two six packs of beer each week for almost 20 years, until his second DUI. PSI at 29-34. He admitted that he drank a six pack daily during his divorce proceedings, but blamed his DUI on marital problems. Report at 10-11. His daughter and parents have told him that he should not drink at all. *Id.* at 14. His father has a history of heavy drinking, and his brother has three DUIs and liver disease caused by excessive drinking. However, he minimizes the fact that he has only one less DUI than his brother, whom he considers an alcoholic. Report at 16. During the hearing he said that even though he had abused alcohol in the past, he did not believe he was abusing alcohol at that time and for that reason has not requested an AA sponsor or returned to meetings since he attended one in January 2006. Tr. at 75-79. He did not feel that he belonged in AA. *Id.* at 84. He admits that he was intoxicated as recently as 2004, two years before the hearing but two years after his second DUI. *Id.* at 79-80. He decided to wait until the outcome of the hearing to determine if he would attend AA. *Id.* at 84.

To sum up, there is persuasive evidence in the record that the individual had a pattern of heavy drinking in the past. He has admitted to two DUIs in the past six years. Further, he has had no rehabilitation or alcohol treatment. He continues to drink, albeit responsibly, but appears to minimize the seriousness of his problem. He is making minimal effort to find a treatment program that would provide the rehabilitation recommended by the psychiatrist. The individual experienced both DUIs during a time of stress in his life and he has had no treatment to enable him to avoid such serious consequences in the future should he experience similar stressors again. Without rehabilitation or reformation, the security concerns remain.

2. Falsification

Cases involving verified falsifications are difficult to resolve favorably for the individual because there are neither experts to opine about what constitutes rehabilitation or reformation from lying nor security programs to achieve rehabilitation. Therefore, Hearing Officers must look at the statements of a person, the facts surrounding the falsification and

professional or a licensed clinical social worker who works with a recognized alcohol treatment program. Adjudicative Guidelines (December 29, 2005) at 11. It is also not clear that the author of the report was aware of the individual’s first DUI arrest. Report at 12, fn. 23-24.

³ I note that the individual concealed his alcohol arrests from two people very close to him-- his girlfriend, who spends most of her time with him, and the close friend who also testified on his behalf at the hearing. The individual testified that he was not proud of his arrests, and told only his daughter and parents. Tr. at 75. He was also too embarrassed to tell his girlfriend that he had attended two AA meetings. *Id.* at 87. This concealment could create a vulnerability to exploitation, manipulation, or duress. Adjudicative Guidelines at 8.

the individual's subsequent history in order to assess whether a person has rehabilitated himself from the falsehood and whether restoring the security clearance would pose a threat to national security. See *Personnel Security Hearing*, Case No. VSO-0440, 28 DOE ¶ 82,807 (2001) (affirmed by OSA, 2001). The key issue is whether the individual has brought forth evidence in the record to demonstrate that he can be trusted to be consistently honest with the DOE. See *Personnel Security Hearing*, Case No. VSO-0442, 28 DOE ¶ 82,815 (2001) (affirmed by OSA, 2001).

It is undisputed that in 2005 during his psychiatric evaluation, the individual admitted drug use that he had not disclosed in 2003 on his QNSP. He contends, however, that he felt pressured during the evaluation to admit to drug use. At the hearing, the individual explained that he was not certain that he had ever smoked marijuana in 1999 or 2000. According to the individual, the DOE psychiatrist told him that a reliable source stated that the individual had smoked marijuana in 1999 or 2000. Tr. at 61. He argued that the "reliable source" was probably his ex-wife who wanted to hurt him and his career. *Id.* at 64. He admits that he had parties at his home where some guests would smoke marijuana, but he doesn't recall ever smoking himself. *Id.* at 62. The individual testified that he was "90% certain that [he] did not smoke marijuana in 1999 or 2000." *Id.* at 63. He contends that he was intimidated by the psychiatrist :

A. I felt pressured to give an answer that perhaps I did. I was very reluctant in admitting to it. And I said, well, perhaps I did.

Q. So, as we sit here today the, is this statement true or not with regard to your drug use?

A. Well, there again, I would vouch that I did not use drugs in '99, 2000."

Tr. at 67.

After reviewing the record, I find that the individual did deliberately omit information on his QNSP when he did not disclose marijuana use in 1999 or 2000. During the hearing the individual admitted that he regularly had one or two parties a year at his house where some of the guests would smoke marijuana. Tr. at 62. Also, the individual provided the details of his 1999-2000 marijuana use to the psychiatrist prior to learning what the source had disclosed:

I asked him, "When was your last use of any illegal drug?" There was a long pause. I said, "Be honest with me." He said, "In '99 or 2000." I asked him what he used. He said he smoked marijuana. I asked him where and he said "In my back yard." I asked him, "Whose marijuana?" He said, "One of the guys who shared it."

Report at 16.

This exchange does not give the impression that the individual was pressured into admitting something that he did not do. It is unclear from the record how or why his

nervousness would lead him to fabricate a tale of marijuana smoking. Given the individual's disclosure that he had parties at least once a year where he allowed his guests to smoke marijuana, it is not unlikely that he himself smoked marijuana at one of those events. The individual himself says that he cannot be certain. Thus, I do not accept the individual's explanation that he was pressured into his admission, and I find that the individual has not mitigated the security concerns regarding his falsification.

3. Marijuana Use

The individual admitted occasional marijuana use during high school, approximately 20 years ago. However, DOE did not ask the psychiatrist to evaluate this drug use, which was mitigated by time. Report at 2-3. The individual testified that the account of his alleged marijuana use in 1999 or 2000 during a party was not credible, and a friend who attended the party testified that he did not see the individual smoke there. His witnesses testified that he does not use drugs, they do not use drugs, and he avoids those individuals who do.⁴

I previously concluded that it is not unlikely that the individual used marijuana at a party at his home. However, I find that this use was infrequent, it occurred while the individual did not hold a clearance, and does not approach the level of abuse or dependence. Moreover, the DOE psychiatrist concluded that the marijuana use was not significant enough for a psychiatric diagnosis regarding drug use. The psychiatrist testified that "it's just use, it wasn't abuse or dependence." Tr. at 27. Therefore, I find that the individual has mitigated the security concern arising from his use of marijuana in the past.

II. Conclusion

As explained in this Decision, I find that the DOE Operations Office properly invoked 10 C.F.R. § 710.8 (f),(j), (k) (Criteria F, J, and K). However, the individual has presented adequate mitigating factors regarding the Criterion K concern that alleviates the legitimate security concerns of the DOE Operations Office regarding that criterion. The individual has not, however, mitigated the security concerns of Criteria F and J. Thus, in view of Criteria F and J and the record before me, I cannot find that granting the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual should not be granted access authorization at this time. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: July 24, 2006

⁴ This contradicts the individual's testimony that some party guests smoked marijuana at his house.